



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92798; File No. SR-PEARL-2021-33]

Self-Regulatory Organizations; MIAX PEARL, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the MIAX Pearl Options Fee Schedule to Increase the Monthly Fees for MIAX Express Network Full Service Ports

August 27, 2021.

I. Introduction

On July 1, 2021, MIAX PEARL, LLC (“MIAX Pearl” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change (File Number SR-PEARL-2021-33) to amend the MIAX Pearl Options Fee Schedule (“Fee Schedule”) to increase monthly fees for the Exchange’s MIAX Express Network Full Service MEO Ports.³ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ The proposed rule change was published for comment in the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ “MEO Interface” or “MEO” means a binary order interface for certain order types as set forth in Rule 516 into the MIAX Pearl System. See Notice, infra note 5, at 37347 n.3.

⁴ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a

Federal Register on July 15, 2021.⁵ The Commission has received no comment letters on the proposed rule change. Under Section 19(b)(3)(C) of the Act,⁶ the Commission is hereby: (i) Temporarily suspending File Number SR-PEARL-2021-33; and (ii) instituting proceedings to determine whether to approve or disapprove File Number SR-PEARL-2021-33.

II. Description of the Proposed Rule Change

MIAX Pearl proposes to increase the monthly fees for Full Service MEO Ports, which fee increases became effective July 1, 2021.⁷ The Exchange states that Full Service MEO Ports are used for by options Members to submit quotes and orders and allow for a higher throughput rates than other ports offered by the Exchange, such as FIX ports.⁸

Full Service MEO Ports are of two types: Bulk and Single.⁹ An options Member using Full Service MEO Ports may be allocated up to two (2) Full Service MEO Ports for each Matching Engine to which it connects (two Bulk, two Single, or one of each), and the monthly fee for Full Service MEO Port use will be determined by volume, according

due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ See Securities Exchange Act Release No. 92365 (July 9, 2021), 86 FR 37347 (“Notice”).

⁶ 15 U.S.C. 78s(b)(3)(C).

⁷ See Notice, supra note 5, at 37347.

⁸ See Notice, supra note 5, at 37349.

⁹ See Notice, supra note 5, at 37348 n. 5-6. “Full Service MEO Port – Bulk” means an MEO port that supports all MEO input message types and binary bulk order entry “Full Service MEO Port – Single” means an MEO port that supports all MEO input message types and binary order entry on a single order-by-order basis, but not bulk orders.

to tiered schedules.¹⁰ More specifically, the Exchange assesses Members Full Service MEO Port fees based upon the monthly total volume executed by a Member and its Affiliates¹¹ on the Exchange across all origin types, not including Excluded Contracts,¹² as compared to the Total Consolidated Volume (“TCV”),¹³ in all MIAX Pearl-listed options, with separate schedules for Bulk and Single.

The Exchange proposes to increase fees for all Full Service MEO Port as follows:
For Full Service MEO Ports - Bulk, if the Member’s relevant monthly volume falls within the parameters of:

- Tier 1 (up to 0.30% TCV): the monthly fee would increase from \$3,000 to \$5,000;
- Tier 2 (above 0.30%, up to 0.60% TCV): the monthly fee would increase from \$4,500 to \$7,500; and
- Tier 3 (above 0.60% TCV): the monthly fee would increase from \$5,000 to \$10,000.

¹⁰ See Notice, supra note 5, at 37348. The Exchange states that it currently has twelve matching engines, which means that for a single monthly fee, a Member may receive up to twenty-four Full Service MEO Ports for that single fee. Id.

¹¹ “Affiliate” means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm’s Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). See Notice, supra note 5, at 37348 n.11.

¹² “Excluded Contracts” means any contracts routed to an away market for execution. See Notice, supra note 5, at 37348 n.12.

¹³ “TCV” means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). See Notice, supra note 5, at 37348 n.13.

For Full Service MEO Ports - Single, if the Member's relevant monthly volume falls within the parameters of:

- Tier 1 (up to 0.30% TCV): the monthly fee would increase from \$2,000 to \$2,500;
- Tier 2 (above 0.30%, up to 0.60% TCV): the monthly fee would increase from \$3,375 to \$3,500; and
- Tier 3 (above 0.60% TCV): the monthly fee would increase from \$3,750 to \$4,500.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹⁴ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁵ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization ("SRO") if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

In support of the proposed fee increases, the Exchange argues principally that the fees for Full Service MEO Ports are constrained by competitive forces, and that this is supported by their revenue and cost analysis. In particular, the Exchange states that there

¹⁴ 15 U.S.C. 78s(b)(3)(C).

¹⁵ 15 U.S.C. 78s(b)(1).

are 16 options markets that are “highly competitive” and that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices.¹⁶ In further support of its argument that competitive forces constrain its proposed Full Service MEO Port fee increases, the Exchange states that there is no regulatory requirement that any market participant connect to the Exchange or that any market participant connect at any specific connection speed.¹⁷ The Exchange further states no options market participant is required by rule, regulation, or competitive forces to be a Member of the Exchange, which the Exchange believes is illustrated by the fact that it is unaware of any one options exchange whose membership includes every registered broker-dealer.¹⁸

The Exchange also states that the proposed fees are designed to recover a portion of the costs associated with directly accessing the Exchange and that the proposed increases are reasonable and appropriate to allow the Exchange to offset expenses the Exchange has and will incur in relation to providing the Full Service MEO Ports.¹⁹ The Exchange provides an analysis of its revenues, costs, and profitability associated with these fees, which it references as “Proposed Access Fees.” The Exchange states that this analysis reflects an extensive cost review in which the Exchange analyzed every expense item in the Exchange’s general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the

¹⁶ See id. at 37350. The Exchange adds that the Exchange had combined market share of 5.31% in June 2021 and it is aware of no evidence that this provides the Exchange with anti-competitive pricing power.

¹⁷ See id. at 37354.

¹⁸ See Notice, supra note 5, at 37454-55.

¹⁹ See Notice, supra note 5, at 37349.

access services.²⁰ The Exchange states that this analysis shows fee increase will not result in excessive pricing or supra-competitive profits when compared to the Exchange's annual expense associated with providing the MEO Ports versus the annual revenue for the MEO Ports.²¹

The Exchange states that for 2021, the total annual expense for providing the access services associated with the Proposed Access Fees for the Exchange is projected to be approximately \$897,084.²² The \$897,084 in projected total annual expense is comprised of the following, all of which the Exchange states are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees. The Exchange states that the \$897,084 in projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange.

The Exchange states that the total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the access services associated with the Proposed Access Fees is projected to be

²⁰ See Notice, supra note 5, at 37350. The Exchange also states that no expense amount is allocated twice and the expenses only cover the MIAX Pearl options market. Id. at 37354. Expenses associated with the MIAX Pearl equities market are accounted for separately and are not within the scope of this filing. See id. at 37384.

²¹ See Notice, supra note 5, at 37350.

²² See Notice, supra note 5, at 37351.

\$40,166 for 2021.²³ The Exchange represents that it determined whether third-party expenses related to the access services associated with the Proposed Access Fees, and, if such expense did so relate, determined what portion (or percentage) of such expense represents the cost to the Exchange to provide access services associated with the Proposed Access Fees. This includes allocating a portion of fees paid to: (1) Equinix, for data center services (approximately 1.80% of the Exchange's total applicable Equinix expense); (2) Zayo Group Holdings, Inc. for network services (approximately 0.90%); (3) Secure Financial Transaction Infrastructure and various other services providers (approximately 0.90%); and (4) various other hardware and software providers (approximately 0.90%).

In addition, the Exchange states that the total internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be \$856,918 for 2021.²⁴ The Exchange represents that: (1) The Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be \$783,513, which is a portion of the Exchange's total projected expense of \$9,163,894 for employee compensation and benefits (approximately 8.55%); (2) the Exchange's depreciation and amortization expense relating to providing the access services associated with the Proposed Access Fees is projected to be \$64,456, which is a portion of the Exchange's total projected expense of \$2,864,716 for depreciation and amortization (approximately

²³ See Notice, supra note 5, at 37351-52.

²⁴ See Notice, supra note 5, at 37352-53.

2.25%);²⁵ and (3) the Exchange's occupancy expense relating to providing the access services associated with the Proposed Access Fees is projected to be \$8,949, which is a portion of the Exchange's total projected expense of \$497,180 for occupancy (approximately 1.80%).

The Exchange states that this cost and revenue analysis shows that the proposed rule change will not result in excessive pricing or supra-competitive profit.²⁶ The Exchange projects that, on a fully-annualized basis, the Proposed Access Fees will have an expense of \$897,084 per annum and a projected revenue of \$1,467,000 per year, resulting in a projected profit margin of 39% (\$1,467,000 in projected revenue minus \$897,084 in projected expense = \$578,916 profit per year). The Exchange states that this estimated profit margin for Full Service MEO Port fees is well below the operating profit margins of other competing exchanges based on financial statements filed by them in 2019 Form 1 amendments.²⁷ The Exchange also states that its proposed increased Full Service MEO Port fees are in line with, or cheaper than, the similar port fees or similar membership fees charged by other options exchanges.²⁸

²⁵ The Exchange states that the total projected expense of \$2,864,716 for depreciation and amortization differs from the projected expense of depreciation and amortization projected by the Exchange in a different filing (SR-PEARL-2021-32) because the Exchange factors in the depreciation of its own internally developed software when assessing costs for Full Service MEO Ports, resulting in a higher depreciation expense number in this filing. See Notice, supra note 5, at 37353, n.30.

²⁶ See Notice, supra note 5, at 37353.

²⁷ See Notice, supra note 5, at 37354. The Exchange states that Nasdaq ISE, LLC's operating profit margin for 2019 was 83% and Nasdaq PHLX LLC's operating profit margin for 2019 was 67%.

²⁸ See Notice, supra note 5, at 37349. See also Notice, supra note 5, at 37348 n.9.

The Exchange further states that its proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates Miami International Securities Exchange, LLC (“MIAX”) and MIAX Emerald, LLC (“MIAX Emerald”), are still recouping the initial expenditures from building out their systems while “legacy” exchanges have already paid for and built their systems.²⁹ The Exchange also notes that its affiliates, MIAX and MIAX Emerald, also charge fees for their high throughput, low latency MEI Ports in a similar fashion as the Exchange charges for its MEO Ports.³⁰ Furthermore, the Exchange notes that it has historically undercharged for Full Service MEO Ports as compared to other options exchanges and the proposed monthly fee increases for Full Service MEO Ports would bring the Exchange’s fees more in line with that of other options exchanges, while maintaining a competitive fee structure for Full Service MEO Ports.³¹

The Exchange states that the proposed fees are equitably allocated, not unfairly discriminatory, and do not impose an unnecessary or inappropriate burden on competition because the Proposed Access Fees do not favor certain categories of market participants,³² the allocation of the Proposed Access Fees reflects the network resources consumed by the various size of the market participants, with the lowest bandwidth consuming members paying the least, and the highest bandwidth consuming paying the

²⁹ See Notice, supra note 5, at 37354.

³⁰ See MIAX Fee Schedule, Section 5)d)ii); MIAX Emerald Fee Schedule, Section 5)d)ii).

³¹ See Notice, supra note 5, at 37349.

³² See id. at 37354.

most;³³ and options market participants are not forced to connect to (and purchase MEO Ports from) all options exchanges.³⁴

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.³⁵ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”³⁶

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;³⁷ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;³⁸ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.³⁹

³³ See Notice, supra note 5, at 37355.

³⁴ For a more detailed description of the Exchange’s justifications for the proposed rule change, see Notice, supra note 5, at 37349-55.

³⁵ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

³⁶ Id.

³⁷ 15 U.S.C. 78f(b)(4).

³⁸ 15 U.S.C. 78f(b)(5).

³⁹ 15 U.S.C. 78f(b)(8).

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the proposal to increase fees for the Exchange's Full Service MEO Ports is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁴⁰

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.⁴¹

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)⁴² and 19(b)(2)(B) of the Act⁴³ to determine whether the proposed rule change should be approved or disapproved.

⁴⁰ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁴¹ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴² 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

⁴³ 15 U.S.C. 78s(b)(2)(B).

Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,⁴⁴ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”⁴⁵
- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors

⁴⁴ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

⁴⁵ 15 U.S.C. 78f(b)(4).

and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”⁴⁶ and

- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”⁴⁷

As discussed in Section III above, the Exchange makes various arguments in support of the proposal. The Commission believes that there are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposal to increase Full Service MEO Port fees is consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”⁴⁸ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁴⁹ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁵⁰

⁴⁶ 15 U.S.C. 78f(b)(5).

⁴⁷ 15 U.S.C. 78f(b)(8).

⁴⁸ 17 CFR 201.700(b)(3).

⁴⁹ See id.

⁵⁰ See id.

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act, specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act;⁵¹ as well as any other provision of the Act, or the rules and regulations thereunder.

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and

⁵¹ See 15 U.S.C. 78f(b)(4), (5), and (8).

arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵²

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-PEARL-2021-33 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-PEARL-2021-33. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The

⁵² 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-PEARL-2021-33 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁵³ that File Number SR-PEARL-2021-33 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Vanessa A. Countryman,

Secretary.

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⁵³ 15 U.S.C. 78s(b)(3)(C).

⁵⁴ 17 CFR 200.30-3(a)(57) and (58).